

US West Financial Services, Inc., Docket No. QF90-175-001

[62,146]

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US West Financial Services, Inc., Docket No. QF90-175-001

Order Granting in Part and Denying in Part Application for Certification as a Qualifying Cogeneration Facility

(Issued June 6, 1991)

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler, Jerry J. Langdon and Branko Terzic.

On August 14, 1990, as completed on March 8, 1991, US West Financial Services, Inc. (US West) filed an application for certification of a bottoming-cycle cogeneration facility as a qualifying cogeneration facility. The facility, located in Ore Grande, California, consists of two steam turbine generators, with a net electric power production capacity of 22.28 MW, seven heat recovery boilers and two natural gas- or oil-fired auxiliary boilers. The energy input to the system is first used in the production of cement in coal-fired kilns and the reject heat emerging from that process is used to produce steam in the heat recovery boilers. This steam, together with steam produced by the auxiliary boilers, is used for the generation of electric power.

The facility was initially installed in 1954 and all of the facility's boilers were installed prior to March 13, 1980.

Notice of the initial filing was published in the *Federal Register*, with comments, protests or motions to intervene due on or before August 27, 1990.¹ Notice of the amended filing was published in the *Federal Register*, with comments, protests or motions to intervene due on or before April 25, 1991.² No comments, protests or motions to intervene were filed.³

Discussion

The Commission, in acting on an application for certification of qualifying status, essentially renders a declaratory order. That is, the Commission determines, based on the information in the application and pleadings, whether or not a facility meets or does not meet the statutory and regulatory requirements for qualifying status set forth in the Public Utility Regulatory Policies Act of 1978 (PURPA) and the Commission's implementing regulations.⁴

As a preliminary matter, we must first determine whether US West's facility satisfies the statute's and the Commission's definition of "cogeneration facility" and the Commission's definition of "bottoming cycle cogeneration facility." We must also determine whether the facility meets the requirements established by the Commission respecting fuel efficiency. Finally, we must determine whether US West, which owns, either directly or indirectly through its affiliates, other electric generating facilities, satisfies the Commission's ownership requirement for qualifying facilities.

A. Qualifying Capacity

Section 292.202(c) of the Commission's regulations defines a "cogeneration facility" as

equipment used to produce electric energy and forms of useful thermal energy (such as heat or steam) used for industrial, commercial, heating or cooling purposes, through the sequential use of energy.⁵

Section 292.202(e) of the Commission's regulations further defines a "bottoming-cycle cogeneration facility" as

a cogeneration facility in which the energy input to the system is first applied to a useful thermal energy process, and the reject heat emerging from the process is then used for power production.⁶

US West claims that its entire facility satisfies the above definitions.

We disagree. The Commission has considered an application for certification of a very similar

[62,147]

facility.⁷ In that case, steam for the generation of electricity was produced in waste heat boilers from heat first used in cement kilns. Steam for the generation of electricity also was produced in a separate auxiliary boiler. The Commission determined that steam supplied directly from the separate auxiliary boiler to the steam turbine generators did not meet the section 292.202(c) test for sequential energy use.⁸ The Commission reasoned that steam from the auxiliary boiler was used directly for the production of electric power without first having served a useful thermal purpose. The Commission thus certified only that portion of the electrical output from the facility representing sequential energy use; it refused to certify the portion of the output attributable to the nonsequential use of the steam produced in the auxiliary boiler.⁹

Here, US West informs us that 85.5 percent of the facility's steam flow to the steam turbines is provided from the heat recovery boilers and that 14.5 percent of the steam flow is provided from the auxiliary natural gas- or oil-fired boilers. Applying our precedent, we conclude that the maximum qualifying capacity of the facility is 19.05 MW (22.28 MW x .855). The remaining capacity (3.23 MW) is nonqualifying power.

B. Operating and Efficiency Standards

The facility was initially installed in 1954 and all of the facility's boilers were installed prior to March 13, 1980. Under section 292.205 of the Commission's regulations, the efficiency standard does not apply to a cogeneration facility built before March 13, 1980.¹⁰ Furthermore, there is no applicable operating standard for a bottoming-cycle cogeneration facility. We therefore find the facility satisfies the operating and efficiency criteria for qualifying cogeneration facilities set forth in section 292.205 of our regulations.

C. Ownership

Section 292.206 of the Commission's regulations sets forth the ownership criteria for qualifying facilities.¹¹ As a general rule, a qualifying cogeneration or small power facility "may not be owned by a person primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities)."¹² For purposes of the ownership criteria, a cogeneration or small power production facility will be considered to be "owned by a person primarily engaged in the generation or sale of electric power" if more than 50 percent of the equity interest in the facility is held by an electric utility or utilities, or by an electric utility holding company or companies, or any combination thereof. Ownership by a subsidiary of an electric utility or electric utility holding company is considered ownership by the electric utility or electric utility holding company.¹³ Exceptions are provided if an electric utility (1) has first obtained an exemption by rule or order issued pursuant to section 3(a)(3) or section 3(a)(5) of the Public Utility Holding Company Act of 1935 (PUHCA) or (2) has been declared not to be an electric utility company by rule or order of the Securities and Exchange Commission (SEC) pursuant to section 2(a)(3)(A) of PUHCA.¹⁴

The facility in the instant docket is entirely owned by US West. US West states that it and its affiliates presently hold, either directly or indirectly, ownership interests in three other cogeneration and small power production facilities. Specifically, US West is a general partner in a limited partnership which indirectly owns the USW Altamont facility, a 10 MW wind power small power production facility located in Alameda County, California. The USW Altamont facility has been self-certified as a qualifying small power production facility.¹⁵ US West is a limited partner in First Midland, L.P., which indirectly owns the Midland Cogeneration facility, a 1,357 MW gas-fired cogeneration facility located in Midland, Michigan. The Midland facility has been certified by the Commission as a qualifying cogeneration facility.¹⁶ In addition, US West owns a 200 MW gas-fired cogeneration facility which has been leased to the Dow Chemical Company.

[62,148]

This facility has not been certified as a qualifying facility.

We find that US West's ownership interest in these facilities does not cause it to fail the ownership test for the instant facility. Section 292.206(a) provides that ownership in cogeneration and small power production facilities does not, in itself, fail the ownership requirement for qualifying facilities.¹⁷

US West further states that it and its affiliates also have ownership interests in three electric generating facilities which are

leased to public utilities. These facilities are: (1) Kansas Gas & Electric Company's 630 MW La Cygne Unit No. 2; (2) Cleveland Electric Illuminating Company/The Toledo Edison Company's Bruce Mansfield Units 1, 2 and 3 (2,360 MW total); and (3) Century Power Corporation's 360 MW Springerville Station Unit No. 1.

US West asks the Commission to find that its ownership interests in these facilities conform to the requirements of Rule 7(d) under PUHCA¹⁸ and that US West and its affiliates, under section 292.206(c) of the Commission's regulations,¹⁹ cannot be considered electric utility companies as defined by PUHCA. In support of its claim of exemption from being considered an electric utility company by virtue of its ownership interests in La Cygne Unit No. 2 and Bruce Mansfield Units 1, 2, and 3, US West has submitted copies of the certificates which were filed with the SEC pursuant to the SEC's Rule 7(d). The SEC, not having acted on the certificates, has in effect granted an exemption under PUHCA section 2(a)(3).²⁰

The Commission has stated that evidence similar to that submitted by US West with respect to its interests in La Cygne Unit No. 2 and Bruce Mansfield Units 1, 2, and 3 is sufficient for the Commission to find a section 292.206(c) exemption to be applicable.²¹ We therefore find that US West's ownership in those plants does not render it ineligible to own a qualifying facility.

With respect to its ownership interest in Springerville Station Unit No. 1, US West has submitted a no-action letter from the SEC. The no-action letter expresses the view of the SEC's staff that US West and its affiliates will not be considered electric utility companies due to their ownership interest in the Springerville Station Unit No. 1. Such a no-action letter is not sufficient, in itself, for the Commission to make a finding that US West qualifies for an exemption under section 292.206(c) of its regulations.²² We have, however, independently reviewed the lease agreement for Springerville Station Unit No. 1 and have determined that the lease agreement confirms that the requirements of Rule 7(d) under PUHCA have been satisfied. The lease is a net lease arrangement under which US West and its affiliates play only a passive role in the generation and sale of electric power and the tenants have complete control over the facility's operation; the initial term of the agreement extends for a period of not less than 15 years; and the rent payments do not include any amounts based on utility income. Accordingly, US West's ownership of the Springerville facility does not make it an electric utility for purposes of section 292.206 of our regulations.²³

[62,149]

We therefore find that US West may own more than 50 percent of the facility at issue in this proceeding. The Commission accordingly finds that the proposed facility is a qualifying facility with a net generating capacity of 19.05 MW. This finding assumes that the nonqualifying power produced by US West's facility is used entirely for internal purposes rather than sold.²⁴ US West's decision to sell the nonqualifying power would present us with an entirely different question which we need not address here.

The Commission orders:

The application for certification of qualifying status filed on August 14, 1990, and completed on March 8, 1991, by US West Financial Services, Inc., pursuant to section 292.207 of the Commission's regulations and section 3(18)(B) of the Federal Power Act, as amended by section 201 of the Public Utility Regulatory Policies Act of 1978, is hereby granted in part and denied in part in accordance with the findings contained in the body of this order, provided the facility operates in the manner described in the application.²⁵

-- Footnotes --

[62,146]

¹ 55 Fed. Reg. 36,697 (1990).

² 56 Fed. Reg. 13,812 (1991).

³ The instant application originally was docketed as Docket No. QF90-207-000, but has been redocketed as Docket No. QF90-175-001. The facility was self-certified, pursuant to section 292.207 of the Commission's regulations, in Docket No. QF90-175-000 under the name Riverside Cement Company. Ownership of the facility has changed since the notice of certification was filed in Docket No. QF90-175-000.

⁴ *Georgetown Cogeneration, L.P.*, 54 FERC ¶61,049, at pp. 61,184-85 (1991), *reh'g denied*, 55 FERC ¶61,038 (1991) (citing *CMS Midland, Inc.*, 50 FERC ¶61,098, at pp. 61,277-78 (1990), *reh'g pending*).

⁵ 18 C.F.R. §292.202(c) (1990). This definition tracks that set forth in the statute. *See* 16 U.S.C. §796(18)(A) (1988).

⁶ 18 C.F.R. §292.202(e) (1990).

[62,147]

⁷ *California Portland Cement Company*, 20 FERC ¶61,217 (1982).

⁸ *Id.* at p. 61,419.

⁹ *Id.*

¹⁰ 18 C.F.R. §§292.205(a)(2), 292.205(b)(2) (1990).

¹¹ *Id.* §292.206.

¹² *Id.* §292.206(a). This general requirement tracks the language of section 3(18)(B)(ii) of the Federal Power Act (FPA), as amended by PURPA, which similarly precludes ownership of a “qualifying cogeneration facility” by persons “primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).” 16 U.S.C. §796(18)(B)(ii) (1988).

¹³ 8 C.F.R. §292.206(b) (1990).

¹⁴ *Id.* §292.206(c).

¹⁵ Dai-Ichi Kangyo Bank of California, as Trustee, QF86-1060-000, self-certification filed September 12, 1986.

¹⁶ *CMS Midland, Inc.*, 50 FERC ¶61,098 (1990), *reh'g pending*; *Midland Cogeneration Venture, L.P.*, 50 FERC ¶61,259 (1990), *reh'g pending*.

[62,148]

¹⁷ *See supra* notes 10-11 and accompanying text (quoting section 292.206(a)). US West states that all of the electric energy produced by the Dow Chemical facility is for Dow Chemical’s own use and not for resale. Based on US West’s representations, its ownership interest in the Dow Chemical facility should not classify US West as an electric utility company under section 2(a)(3) of PUHCA, 15 U.S.C. §79b(a)(3) (1988), which exempts from the definition of electric utility company the owners of facilities whose electric output is sold to tenants for their own use and not for resale.

¹⁸ Rule 7(d) provides in part that a company will not be considered an electric utility provided that: (1) the company owns the facility as the beneficiary under trust arrangements; (2) the facility is leased under a net lease arrangement directly to a public utility; (3) the company is otherwise primarily engaged in one or more businesses other than the business of a public utility; (4) the terms of the lease have been expressly authorized or approved by a regulatory authority having jurisdiction over the rates and services of the public utility which leases the facility; (5) the lease extends for an initial term of not less than 15 years; (6) the rent paid under the lease does not include any amount based on revenues or income of the public utility; and (7) the company files a certificate with the SEC, demonstrating that the applicant qualifies for exemption under section 2(a)(3) of PUHCA, on a form prescribed by the SEC within 30 days of execution of the lease. 17 C.F.R. §250.7(d) (1990).

¹⁹ 18 C.F.R. §292.206(c) (1990).

²⁰ SEC Rule 7(d), 17 C.F.R. §250.7(d) (1990), provides for an automatic exemption under PUHCA section 2(a)(3) for electric utility companies meeting certain requirements (specified in 17 C.F.R. §250.7(d)(1)). Companies specified in 17 C.F.R.

§250.7(d)(1) are required to file a certificate with the SEC. 17 C.F.R. §250.7(d)(5). US West has provided this Commission with copies of the SEC Rule 7(d) certificates claiming automatic exemption as evidence of the exemption.

²¹ *Long Lake Energy Corporation*, 51 FERC ¶61,262, at p. 61,774 (1990).

²² *Id.* at p. 61,774 n.30 (citing *Trenton District Energy Company*, 42 FERC ¶61,134 (1988)).

²³ *Cf. Green Mountain Power Corporation*, 53 FERC ¶61,035 (1990) (FERC disclaimer of jurisdiction over public utility in sale and leaseback transaction);

[62,149]

United Illuminating Company, 29 FERC ¶61,270 (1984); *Pacific Power & Light Company*, 3 FERC ¶61,119 (1978).

²⁴ *See Adolph Coors Company*, 34 FERC ¶61,209, at p. 61,356 n.6 (1986).

²⁵ Certification as a qualifying facility serves only to establish eligibility for benefits provided by the Public Utility Regulatory Policies Act of 1978, as implemented by the Commission's regulations, 18 C.F.R. Part 292. It does not relieve a facility of any other requirements of local, state or federal law, including those regarding siting, construction, operation, licensing and pollution abatement. Certification does not establish any property rights, resolve competing claims for a site, or authorize construction.